

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

Criminal No. 3:07CR70-003

RODNEY TYREAL WHEELER,
Defendant.

NOTICE BY THE UNITED STATES OF INTENTION TO
PRESENT RULE 404(b) EVIDENCE OF PRIOR CONVICTIONS

Now comes the United States of America, by Sharon L. Potter, United States Attorney for the Northern District of West Virginia, by Thomas O. Mucklow, Assistant United States Attorney for said District, and pursuant to Rule 404(b) of the Federal Rules of Evidence, files the following notice of its intention to introduce evidence of other crimes and bad acts. In support of this notice, the United States offers the following:

1. On September 2, 2004, defendant was arrested in Hagerstown, Washington County, Maryland for possession of a controlled substance with the intent to distribute, a felony. Defendant was convicted on January 4, 2005.

2. On January 7, 2003, defendant was arrested in Ft. Pierce, St. Lucie County, Florida for possession of a controlled substance with the intent to distribute, a felony. Defendant was convicted on July 3, 2003.

3. On October 12, 2000, defendant was arrested in Ft. Pierce, St. Lucie County, Florida for possession of a controlled substance with the intent to distribute, a felony. Defendant was convicted on March 14, 2001.

4. On March 25, 1998, defendant was arrested in Ft. Pierce, St. Lucie County, Florida

for possession of a controlled substance, a felony. Defendant was convicted on June 27, 1998.

5. In the instant case, defendant has sought to suppress an out-of-court identification of him by a confidential informant. Said motion clearly demonstrates defendant's intention to make identity an issue in this case.

6. Evidence of other crimes is not admissible to prove bad character or criminal propensity. Fed.R.Evid. 404(b).¹ Such evidence is admissible, however, to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *See United States v. Queen*, 132 F.3d 991, 994 (4th Cir. 1997).

7. Rule 404(b) is an inclusive rule, allowing evidence of other crimes or acts except that which tends to prove only criminal disposition. *Queen*, 132 F.3d at 994-95; *United States v. Rawle*, 845 F.2d 1244, 1247 (4th Cir. 1988).

8. Evidence of prior acts is admissible under Rules 404(b) and 403 if the evidence is: (1) relevant to an issue other than the general character of the defendant, (2) necessary, (3) reliable, and (4) if the probative value of the evidence is not substantially outweighed by its prejudicial effect. *Queen*, 132 F.3d at 997.

9. Limiting jury instructions explaining the purpose for admitting evidence of prior acts and advance notice of the intent to introduce prior act evidence provide additional protection to

¹ Rule 404(b) provides that:
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

defendants. *Id.*

10. As noted above, defendant has placed the issue of his identity in issue through his suppression motion. Evidence that he had been involved in earlier transactions would refute a defendant of mistaken identity. It is also relevant to the issues of motive, intent, plan, knowledge, and absence of mistake or accident.

11. Defendant is notified that the United States intends to present in its case-in-chief, pursuant to Rule 404(b), evidence as to defendant's prior drug related criminal activity as described above.

Respectfully submitted,

SHARON L. POTTER
UNITED STATES ATTORNEY

By: /s/ Thomas O. Mucklow
Thomas O. Mucklow
Assistant United States Attorney

CERTIFICATE OF SERVICE

I, Thomas O. Mucklow, Assistant United States Attorney for the Northern District of West Virginia, hereby certify that on the 7th day of January, 2008 the foregoing NOTICE BY THE UNITED STATES OF INTENTION TO PRESENT RULE 404(b) EVIDENCE OF PRIOR CONVICTIONS was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Robert C. Stone, Jr., Esq.
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